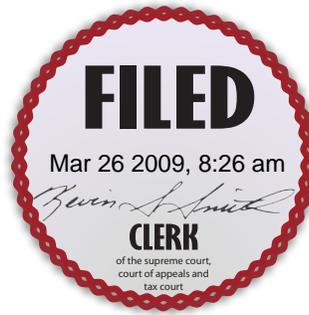


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**THOMAS G. GODFREY**  
Anderson, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**STEVE K. TESMER**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

RUSSELL ALLENDER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 48A04-0809-CR-561

---

APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable Dennis D. Carroll, Judge  
Cause No. 48D01-0301-FB-49

---

**March 26, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Russell Allender appeals the trial court's finding that he violated the conditions of his work release and its execution of his suspended sentence. We affirm.

## **Issues**

We restate the issues as follows:

- I. Did the State present sufficient evidence to establish that Allender violated the conditions of his work release?
- II. Did the trial court abuse its discretion in executing Allender's sentence?

## **Facts and Procedural History**

On May 12, 2003, Allender pled guilty to class B felony burglary and class D felony theft pursuant to a plea agreement. On June 9, 2003, the trial court sentenced him to twelve years for burglary, with five years executed and seven years suspended to probation, and to an eighteen-month concurrent term for theft.

On January 13, 2006, the State filed a notice of probation violation against Allender. On March 27, 2006, the trial court found Allender in violation of probation and executed three years of his suspended sentence, with probation to resume thereafter. On August 17, 2007, the probation department again filed a notice of probation violation against Allender based on new criminal charges. He pled guilty to the charges and was placed on probation, to run consecutive to the sentence in this cause. On October 22, 2007, the trial court found Allender in violation of probation and ordered him to serve two years of work release.

On July 21, 2008, the security supervisor at the Madison County Work Release Center filed a petition to terminate Allender's work release for an alleged violation of the conditions

of work release. On August 26, 2008, following a hearing, the trial court found that Allender had violated the conditions of work release by becoming involved in an altercation at the work release center. The trial court ordered him to serve the balance of his two-year work release commitment, plus one and one-half years, in the Department of Correction. On January 12, 2009, the trial court amended its order to reduce Allender's executed time to the balance of the two-year term with no return to probation. This appeal ensued. Additional facts will be provided as necessary.

## **Discussion and Decision**

### ***I. Sufficiency of Evidence***

Allender contends that the State failed to present sufficient evidence to establish that he violated the conditions of his work release. "A defendant is not entitled to serve a sentence in either probation or a community corrections program. Rather, placement in either is a matter of grace and a conditional liberty that is a favor, not a right." *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999) (citation and internal quotation marks omitted). Because a placement in a community corrections program is civil in nature, the State need only prove alleged violations by a preponderance of the evidence. *McQueen v. State*, 862 N.E.2d 1237, 1242 (Ind. Ct. App. 2007). "The standard of review of an appeal from the revocation of a community corrections placement mirrors that for revocation of probation." *Id.* On review, we consider the evidence most favorable to the trial court's judgment without reweighing that evidence or judging witness credibility. *Id.* If substantial evidence of probative value exists to support the trial court's conclusion that Allender violated any terms of his work release,

we will affirm its decision to revoke his placement. *Id.*; see also *Saxton v. State*, 790 N.E.2d 98, 99 (Ind. 2003) (stating that proof of any one violation is sufficient to revoke a defendant's placement).

The bulk of Allender's sufficiency argument is based on the trial court's admission of hearsay evidence. Probation and community corrections placement revocation hearings involve narrow inquiries and, as such, are more flexible than criminal trials. *Cox*, 706 N.E.2d at 550. "Such flexibility allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007). Therefore, within this framework, and to promote the specific goals of such revocation hearings, courts may admit evidence during these hearings that would not be permitted in a full-blown criminal trial. *Id.* This includes reliable hearsay evidence. *Cox*, 706 N.E.2d at 551. In *Reyes*, our supreme court adopted a "substantial trustworthiness" test in evaluating the use of hearsay evidence at these hearings. Using this test, "the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness." 868 N.E.2d at 441.

Here, Allender argues that the trial court was required to make a specific finding regarding the substantial trustworthiness of certain documents containing statements made by the two officers who observed the altercation. However, as the *Reyes* court stated,

Rather than require that a court make an explicit finding of good cause every time hearsay evidence is admitted during a probation revocation hearing, we hold that the court may instead evaluate the hearsay's substantial trustworthiness ... *[I]deally*, the trial court should explain on the record why the hearsay is reliable and why that reliability is substantial enough to supply good cause for not producing ... live witnesses.

*Id.* at 442 (citation and quotation marks omitted) (emphasis added).

We conclude that Allender waived any objection to the substantial trustworthiness of the hearsay evidence. The State introduced testimony from work release center case manager Katie Stapleton explaining standard procedures for handling conduct violations. State's Exhibit 1, admitted without objection, was an official conduct report in which two officers reported entering the dorm area of the work release center and witnessing Allender with his hands wrapped around the neck of fellow resident David Abbott. The report described Allender as "uncooperative and hostile." State's Ex. 1. State's Exhibit 2, also introduced without objection, was an emergency detention notice that included Officer Butts's account of the altercation and an emergency request that Allender be detained. Tr. at 18. Because Allender failed to object to the admission of these documents, he cannot now be heard to complain about their lack of reliability. *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005).

Allender also alleges insufficiency on the ground that the State never introduced the rules and conditions of his work release. The State requested that the trial court "take judicial notice of the terms and conditions of probation and ... rules of Work Release under this cause." Tr. at 5. Defense counsel responded: "No objection your Honor." *Id.* The State indicated that the work release rules were attached to the probation order, which the trial court judicially noticed. *Id.* at 6. Moreover, as discussed, the trial court admitted, without objection, State's Exhibit 1, which specifically lists Allender's rule violation as "Fighting." At no time during the hearing did Allender contest the existence of a work

release rule against fighting; instead, his defense was that Abbott attacked *him* and that he grabbed Abbott's collar, but did not actually touch Abbott. *Id.* at 22-25.

As the State's chief witness, Abbott testified that Allender punched him in the nose five times during the altercation at the work release center. *Id.* at 9, 14. To the extent that Allender argues an inconsistency between Abbott's testimony and the statements of the two officers who observed Allender with his hands around Abbott's neck, *see* State's Ex. 1 and 2, we note that either account substantiates the trial court's finding that Allender engaged in fighting. Tr. at 26. Accordingly, we affirm the trial court's finding that Allender violated the conditions of his work release.

## ***II. Sentencing***

Allender asserts that the trial court abused its discretion in ordering him to serve two years in the Department of Correction. To the extent he asks us to review and revise his sentence, we reiterate that proceedings involving sanctions for probation and work release violations are more civil than criminal in nature. As such, the review-and-revise remedy found in Indiana Appellate Rule 7(B) is not available. *Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008).

Once a trial court has exercised its grace by ordering probation [or alternative placement] rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation [or alternative placement] to future defendants.

*Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). We therefore use an abuse of discretion standard when reviewing a trial court's decisions regarding such violations. *Id.* An abuse of

discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Here, Allender challenges as excessive the trial court's amended order that he serve the balance of his two-year work release term in the Department of Correction. He bases this argument, in part, on his family circumstances. Allender's girlfriend testified that, at the time of the altercation, Allender was using his work release wages to support her, their three children, and her three children from a previous relationship. The family's only other income source was food stamps.

Family circumstances notwithstanding, the record indicates that Allender has at least two probation violations and three community corrections violations. He has demonstrated an unwillingness or inability to adhere to the terms and conditions of alternative placements. Thus, alternate means of sentencing have proven futile. The trial court acted within its discretion in ordering that Allender serve the remainder of his two-year term in the Department of Correction. Accordingly, we affirm.

Affirmed.

ROBB, J., and BROWN, J., concur.